Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Mary Catherine Baur,

Petitioner

v.

Pennsylvania State Civil Service Commission
(Department of Labor & Industry),

Respondent(s)

On Petition For Writ Of Certiorari
To The Commonwealth Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Whether Petitioner has standing to challenge her non-promotion in the Pennsylvania state civil service due to gender discrimination.

II. Whether, when there is a challenge of gender discrimination under 71 P.S. Section 741.951(b) in an employment practice enumerated under 71 P.S. Section 741.905a, Respondent has discretion to deny a hearing on the merits.

(a). Whether Petitioner met her prima facie burden under the McDonnell Douglas[1]/Burdine[2] test and in the alternative under Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992).

(b). Whether Respondent's choice to use the "employment" list instead of the "promotion" list was evidence of intentional discrimination against Petitioner on the basis of gender to deny her promotion in the Pennsylvania state civil service.

(c). Whether the Respondent's finding in Zanotto v. SCSC, (Appeal No. 24004) of a technical error in the eligible list is equivalent to discrimination per se and entitles Petitioner to the next available position.

III. Whether Petitioner's appeal to the Commonwealth Court of Pennsylvania was frivolous and warranted an award of attorney's fees and costs for the Indispensable Party.

IV. Whether Respondent violated Petitioner's constitutional due process rights.

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[1] McDonnell Douglass v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973).

[2] Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Opinion of the Commonwealth Court appears at Appendix C to the application. The Opinion is unpublished and filed on April 1, 2004.

Decision of the State Civil Service Commission appears at Appendix F to the application and was mailed on June 24, 2003.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The Pennsylvania Supreme Court, the highest state court in Pennsylvania, denied discretionary review on November 24, 2004. Appendix A.

The United States Supreme Court granted an extension of time until April 23, 2005, to file a Petition for a Writ of Certiorari on February 11, 2005. Appendix B.

Review of the April 1, 2004 decision of the Commonwealth Court of Pennsylvania is requested. Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, sec. 2, cl. 1. (Appendix G at A-15)

U.S. Const. amend XIV, sec.1. (Appendix H at A-16)

28 U.S.C.A. sec. 1257(a). (Appendix I at A-17)

42 U.S.C.A. sec. 2000e-2(h). (Appendix J at A-18)

PA. STAT. ANN. tit. 71, sec. 741.905a. (Appendix K at A-25)

PA. STAT. ANN. tit. 71, sec. 741.951(b). (Appendix K at A-25)

STATEMENT OF THE CASE

Procedural History

Petitioner is a female Attorney Examiner I employed by the Workers' Compensation Office of Adjudication, Department of Labor and Industry, Commonwealth of Pennsylvania. She filed a complaint with the Pennsylvania State Civil Service Commission alleging gender discrimination in its promotion practices to the position of Workers' Compensation Judge in violation of 71 P.S. sec. 741.951(b). The filing of the complaint raised the federal question sought to be reviewed by this Court. The Pennsylvania State Civil Service Commission after reviewing the complaint granted a hearing on the merits set for May 7, 2003. The hearing was postponed after Respondent, Department of Labor and Industry, filed a Motion to Dismiss, but not before the Commission received Petitioner's Pre-Hearing Conference Memorandum listing her witnesses and the evidence she planned to produce at the hearing. The Commission issued a decision on June 24, 2003 granting the Motion to Dismiss finding Petitioner lacked standing to contest her non-promotion because she was not within the "rule of three" on the employment list certified.

Petitioner requested reconsideration by the Commission which was denied on July 17, 2003.

Petitioner appealed to the Commonwealth Court of Pennsylvania which affirmed the decision of the Commission in a decision filed April 1, 2004. The Commonwealth Court of Pennsylvania further found Petitioner's appeal was frivolous and charged her attorney's fees and costs for the Indispensable Party in an Order dated May 4, 2004.

Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania which was denied on November 24, 2004.

Petitioner filed an Application for a Stay of Remand of Record Pending United States Supreme Court Review Pursuant to Pa.R.A.P. 2572 with the Supreme Court of Pennsylvania which was denied on December 29, 2004.

Petitioner filed an Application to Extend the Time to File a Writ of Certiorari until April 23, 2005 with this Court on February 7, 2005 which was granted on February 11, 2005.

On February 14, 2005 Indispensable Party filed a Praecipe to Transfer Judgment, February Term 2005, No. 1002, in the Court of Common Pleas for Philadelphia County in Pennsylvania.

On February 28, 2005 Petitioner filed an Application for Stay or Injunction Pending United States Supreme Court Review Pursuant to Pa.R.A.P. 1781 with the Commonwealth Court of Pennsylvania which was denied on March 3, 2005.

On March 15, 2005 the Indispensable Party sent Petitioner Interrogatories in Aid of Execution of the Judgment for attorney fees and costs.

Petitioner now files a writ of certiorari with this Court.

Facts:

Respondent employs a scheme to promote male civil service employees within the class of Attorney Examiner with test scores of 75 or below which has a disproportionate impact on female Attorney Examiner promotion candidates with the same score. Females are only selected by the Respondent from the employment list (71 P.S. sec. 3(n); Appendix K at A-19) and only those with the highest scores are interviewed or hired. The scheme employed by the Department of Labor & Industry to promote only males, despite the fact that they possessed low test scores, was effectuated by use of the civil service regulations that permit the hiring authority to chose what list to use to fill a position. 71 P.S. sec. 741.501 (Appendix K at A-22); 71 P.S. sec. 741.601 (Appendix at A-24); 71 P.S. sec. 741.602 (Appendix K at A-24 and A-25)

The class of Attorney Examiner in the Workers' Compensation Office of Adjudication consisted of only three individuals, two males and one female. All three Attorney Examiners were told when hired in 1996 that they were in training to be Workers' Compensation Judges and would be promoted. Both male Attorney Examiners were promoted. In both instances the promotion list was certified so that the individuals could be reached because they both had a score of 75 and the employment list contained individuals with higher test scores that would not allow the appointing authority to reach the male Attorney Examiners under the "rule of three"(71 P.S. sec. 741.602; Appendix K at A-24).

Respondents wish to preserve their right to choose between an employment list and a promotion list to fill open positions. It is the very presence of this discretion in the administration which acts as a "cloak" to allow gender discrimination to occur.

The State Civil Service Commission in its decision (Appendix F at A-13) refers only to a certified eligible list. It does not address petitioner's argument that three eligible lists are

certified for any open position: an employment list and two promotion lists; one is a state-wide list and one is for the department. Footnote 2 of the decision (Appendix F at A-13) does acknowledge that a vacant position can be filled from "an employment or promotion list". The Commission's determination that Petitioner lacks standing is incorrect. Standing has nothing to do with what list is employed. Petitioner's standing stems from the fact she is a civil service employee who is eligible for the position that is open. The Indispensable Party, Ms. Doneker, was not a civil service employee at the time the Allentown position was posted. The Commission is in fact narrowing standing by the list chosen to be used by the appointing authority. If the Department of Labor and Industry had decided to use the department promotion list or the state-wide promotion list Ms. Doneker's name would not have appeared and, in fact, Petitioner would have been among the top three candidates on both lists. The Commission has thus created a situation where the issue is now one that is recurring and will always evade ordinary review by its very essence.[3] The fact the male Attorney Examiners have been promoted with scores lower than the present Indispensable Party is proof in fact. Someone who is promoted using the promotion list with a score lower than the top three on the employment list is not aggrieved and is the only person who would have standing under the Commission's analysis. Conversely, according to the Commission's analysis, no female candidate in the top three on the employment list would have standing to challenge the promotion of males with lower scores when the promotion list is chosen to be used. Here, the same complaining party will be subject to the same action again.[4] Each time there is a vacancy for a position as a Workers' Compensation Judge the Department of Labor and Industry will have the opportunity to make a decision to use the employment list instead of the promotion list. Each time the Department of Labor and Industry chooses to use the employment list instead of the promotion list they will avoid the Petitioner and Petitioner will be aggrieved. Petitioner believes the current set of

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[3] Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

[4] Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed. 2d 350 (1975).

facts best demonstrates the Department of Labor and Industry's intent to avoid the Petitioner.

The Commonwealth Court's assertion that Petitioner ignores the law concerning the "rule of three" is illogical. (Commonwealth Court Decision dated April 1, 2004; Appendix C at A-8) The Department of Labor and Industry knew Petitioner was within the "rule of three" on the promotion lists because she was interviewed for the same position in Allentown on December 13, 2001 using the same 2001 Judges' test list used to hire Ms. Doneker. Male Attorney Examiner Marc Harrison was promoted to the Allentown position using the department promotion list. One year later he transferred back to the Philadelphia office leaving the Allentown position again vacant.

The Commonwealth Court decision states Petitioner was granted a hearing on February 27, 2003. (Appendix C at A-4) This is misleading because Petitioner was not afforded a hearing on the merits. A hearing date was set for May 7, 2003 but the Commission unconstitutionally cancelled the hearing on April 29, 2003 stating the Motion to Dismiss may resolve the issue and failed to rule on Petitioner's Objections and Motion to Vacate.

The Commonwealth Court ignored Petitioner's constitutional argument as did the Commission. The fact that the Indispensable Party, Beverly Doneker, is a woman, does not cure the fact that she was not a civil service employee or that she was being hired and not promoted. The Commonwealth Court stated that it was difficult to relate Petitioner's arguments to the Commission's Order. (Appendix C at A-6) That is because the Commonwealth Court refused to accept the basic premise of Petitioner's argument that the Commission had ignored her argument. It is obvious the Commonwealth Court has failed to review the underlying documents that constitute the record before the State Civil Service Commission. Both the Commission's Order and the Opinion of the Commonwealth Court fail to acknowledge that there is more than one list available and that someone is making a choice as to which list to use. Petitioner was in the top three on the promotion lists certified at the same time the

employment list used to hire the Indispensable Party was certified. The Department of Labor and Industry made a choice use the employment list and avoid Petitioner.

It is only because the Commonwealth Court has ignored the Petitioner's argument that it finds it has no basis in fact. As there has been no hearing, Petitioner has been precluded from presenting any evidence that would have been subpoenaed to support her claims. To find the Petitioner's argument frivolous and lacking in merit is to add insult to injury. To charge Petitioner attorney fees and costs for the Indispensable Party who was never going to lose her position, is criminal.

Finally, the list relied upon as evidence by Respondent in its Motion to Dismiss has been found to be defective by the State Civil Service Commission itself in its decision rendered November 17, 2004, Sharon Zanotto v. State Civil Service Commission. (Appendix M at A-28) Therefore, no facts have been established in this case to even support Respondent's Motion to Dismiss.

Petitioner examination grade and length of service is equal to the two male Attorney Examiners who were promoted when the Commonwealth chose to use the promotion list. The only difference is gender.

Arguments:

I. WHETHER PETITIONER HAS STANDING UNDER ARTICLE III TO CHALLENGE HER NON-PROMOTION IN THE PENNSYLVANIA STATE CIVIL SERVICE DUE TO GENDER DISCRIMINATION.

Issues of standing may arise for the first time in the Supreme Court.[5] Respondent's holding that Petitioner does not have standing is in contravention of precedent in the Commonwealth of Pennsylvania that requires that Petitioner only be an employee in the Appointing Authority's Department to have standing, Magnelli v. Commonwealth, Pennsylvania State Civil Service Commission, 55 Pa.Commw 531, 423 A.2d 802, 804 (Commw. Ct.), aff'd 498 Pa. 361, 446 A.2d 600 (Sup. Ct. 1908). In Cunningham v. City of Philadelphia, 148 L.R.R.M. 2421 (E.D. Pa. 1995), Magnelli, supra. is cited to find standing where plaintiffs were civil service employees and were on the promotion list but were not at the top of the list and were not eligible for promotion at that time. The Federal District Court found standing existed because, "...Plaintiffs' prospects for future promotion will be directly affected by the manner in which the City interprets and applies the civil service

[5] Bender v. Williamsport School District, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

regulations...." Cunningham, supra. at 2425. The Commonwealth Court of Pennsylvania in Ambron v. Philadelphia Civil Service Commission, 73 Pa. Commw. 628, 458 A.2d 1055 (1983) expanded the holding in Magnelli, supra. by allowing civil service employees who had resigned to have standing based on the mere possibility of future reinstatement. The State Civil Service Commission's (hereinafter "SCSC") original decision to grant Petitioner a hearing on the merits was the correct determination. The Commission's failure to support their decision with any reasoning supported by precedent from the Commonwealth of Pennsylvania, or any other court, to deny Petitioner standing and an opportunity to present her case results in a denial of Petitioner's Equal Protection and Due Process rights.

Article III of the United States Constitution requires an injury in fact, causation and a likelihood that the relief requested will redress the alleged injury.[6] Petitioner meets the requirements for Article III standing as follows: Her injury in fact is that she was not considered for a promised promotion when both male Attorney Examiners were promoted as promised. Her injury was caused by Respondent not choosing to use the promotion list to re-fill the Allentown position in February 2003, and many subsequent open positions. Petitioner was in the top three on

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[6] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04, 118 S.Ct. 1003, 140 L. Ed. 2d 210 (1998).

the promotion list and was able to be considered for promotion in compliance with 71 P.S. Section 602. Petitioner is prevented from being considered for promotion due to the unconstitutional use of 71 P.S. Section 741.601 by Respondent. The Respondent's choice to use either of the promotion lists or the employment list is a barrier being used to make it more difficult for one group to obtain a benefit than it is for a member of another group.

> "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit...."
> Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993).

The discriminatory personnel action was complete when the appointing authority decided not to use a

promotion list. When the decision was made to use the employment list, Petitioner had been avoided and rejected. Petitioner was in the top three on both the state-wide and department promotion lists. The Respondent's argument that the highest test score is the most qualified candidate is a mere pretext to avoid Petitioner.[7] The decision has an exclusionary effect in the case of female promotion candidates. The highest test score is not necessarily an indicator of successful job performance. Civil Service is suppose to reward meritorious service. The goals outlined in 71 P.S. sec. 741.2 of the Civil Service Act are greater efficiency and economy in the administration of the Commonwealth. The practice results in all females being required to have a high score on a test to be hired or promoted, but allows males to be promoted with low scores. So that despite the fact that a female was hired for the position, instead of Petitioner being promoted, the result is still gender discrimination.

The State Civil Service Commission has chosen to refuse to consider "comparables" to prove gender discrimination due to disparate treatment, even though it is required to be set out in the initial appeal for a hearing.[8] Instead, Respondent has created a situation where the

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[7] Neither male Attorney Examiner was in the top three on the employment lists certified at the time of their respective promotions.

[8] Civil Service Regulation Section 105.12(c).

comparison for purposes of discrimination begins after Respondent has made the choice as to which list it will use to fill a position. This is merely an attempt to obviate any evidence Petitioner offered to produce demonstrating discrimination. Petitioner and one male Attorney Examiner, Marc Harrison, had the same immediate supervisor, Judge Manager Thomas Hines. All three Attorney Examiners achieved the same grade on the test; and had the same length of service. Petitioner's immediate supervisor did not provide Petitioner with the same job duties as the male Attorney Examiner also under his supervision.

Petitioner's injury can be redressed by this court by finding that Zanotto v. SCSC acknowledged a technical violation of the Act which is discrimination per se under Pennsylvania law. Respondent would then be required to provide Petitioner with the next available position.[9]. Petitioner's injury could also be redressed by ordering the Pennsylvania State Civil Service Commission to provide Petitioner a hearing on the merits of her claim of discrimination under Section 951(b) of the Act. Finally, this court could grant certiorari and consider adopting the holding in Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992) as an alternative fourth prong to the prima facie case requirements under the McDonnell Douglas/Burdine to

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[9] Pronko v. Commonwealth of Pennsylvania (Department of Revenue), 114 Pa.Commw. 428, 539 A.2d 456 (1988).

achieve uniformity among the Circuits. Currently, Mitchell, supra. is never cited by the Third, Eighth and Tenth Circuits to allow the establishment of the prima facie burden in discrimination where disparate treatment exists. The State Civil Service Commission predicated its present decision on the fact that Petitioner was not within the rule of three on the employment list and found her past employment in the civil service irrelevant to deny her standing to contest her non-promotion. An adoption of the Mitchell, supra. case would preclude this result.

II. WHETHER, WHEN THERE IS A CHALLENGE OF GENDER DISCRIMINATION UNDER 71 P.S. sec. 741.951(b) IN AN EMPLOYMENT PRACTICE ENUMERATED UNDER 71 P.S. sec. 741.905a, RESPONDENT HAS DISCRETION TO DENY A HEARING ON THE MERITS.

The current decision of the Pennsylvania State Civil Service Commission ignores Petitioner's complaint of gender discrimination in the appointing authority's promotion practices. Petitioner alleges that the actions of the appointing authority are a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e)-2(h), and thus are a violation of the United States Constitution's Equal Protection and Due Process Clauses.

> "The standard of review under equal protection rationality analysis... is governed by federal constitutional law, and a state court's application of that standard is fully reviewable in this Court on writ of certiorari." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659, rehearing denied 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222, on remand 304 N.W.2d 915 (Minn. 1981).

In a law review article titled "An Examination of Discrimination Under The Pennsylvania Civil Service Act", author Debra Punsky Rand suggests that Pennsylvania's application of Title VII law to the State Civil Service Act is unique. Rand, *An Examination of Discrimination Under the Pennsylvania Civil Service Act*, 25 Duq. L. Rev. 209 (1987).

II(a). WHETHER PETITIONER MET HER PRIMA FACIE BURDEN UNDER THE McDONALD DOUGLAS/BURDINE TEST AND IN THE ALTERNATIVE UNDER MITCHELL v. TOLEDO HOSPITAL, 964 F.2D 577 (6TH Cir. 1992).

71 P.S. Section 741.905(a) prohibits discrimination in promotion. Com. Dept. of Health v. Nwogwugwu, 141 Pa. Cmwlth. 33, 594 A.2d 847 (1991) holds that the standard of proof where discrimination is alleged requires complainant

to make out a prima facie case of discrimination citing the test to be used as a modified version of the standard of proof developed by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). Petitioner in her complaint to the State Civil Service Commission presented facts sufficient to meet the burden of proof for a prima facie case under the McDonnell Douglas/Burdine, criteria as follows: (i) she is of the female gender classification; (ii) she provided proof that she bid on the job through jobnet, the internal job application system, and was qualified for the position. A fortiori. Petitioner had applied for the same opening the year before and received a letter from the Adjudication Director stating she was qualified.; (iii) despite Petitioner's bid and qualifications, Respondent choose not to use a promotion list to fill the job vacancy. Respondent instead choose to use the employment list to avoid Petitioner; (iv) An outside hire was interviewed and hired who had a test score higher than Petitioner but did not have experience conducting hearings, was significantly younger than Petitioner, and had less years of experience as an attorney than Petitioner.

It is this fourth prong of the McDonnell Douglass/Burdine test that is disputed among the Circuit Courts. Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992) is never cited by the Third, Eighth or Tenth Circuits. It permits an alternative prong to the McDonnell Douglas/Burdine prima facie case where the first three elements have been proven to show disparate treatment. A

plaintiff must produce evidence that establishes at a minimum that a "comparable non-protected person was treated better". The comparables must be similarly situated in all respects i.e. the same supervisor and subject to the same standards. This, Petitioner has presented. Attached to the Notice of Public Hearing issued by the SCSC on March 27, 2003 were Excerpts from Rules of the Civil Service Commission and Regulations of the Executive Director of Civil Service, Chapter 105 - Notice and Hearing, Section 105.12(c)(2) which requires Petitioner to allege how treatment differs from treatment of others similarly situated as part of her complaint to qualify for a hearing on the merits.

> "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices ...."
> McDonnell Douglas Corp. v. Green,
> 411 U.S. 792, 800, 93 S.Ct. 1817,
> 36 L. Ed. 2d 668 (1973).

> "What is required by Congress the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible

classification. Id. at 801.

III(b). WHETHER RESPONDENT'S CHOICE TO USE THE "EMPLOYMENT" LIST INSTEAD OF THE "PROMOTION" LIST WAS EVIDENCE OF INTENTIONAL DISCRIMINATION AGAINST PETITIONER ON THE BASIS OF GENDER TO DENY HER PROMOTION IN THE PENNSYLVANIA STATE CIVIL SERVICE.

Petitioner belongs to the civil service classification of Attorney Examiner. Three Attorney Examiners were hired in 1996 to rectify the backlog of cases as ordered by Eck v. Wofford, No. 86 Civ. 1780 (M.D. Pa. 1995): two males and one female. Petitioner alleges the use of the employment list alleging the non-discriminatory reason of high grades equals most qualified is a pretext to avoid her. Respondent is and has in the past engaged in disparate treatment based on gender. Petitioner was never afforded the same employment opportunities as either male Attorney Examiner.

Pronko v. Commonwealth of PA (Dept. Of Rev.), 114 Pa.Commw. 428, 539 A.2d 456 (1988) provides that a regular status employee's only avenue is via 71 P.S. sec. 951(b) of the Act where the personnel action is for other than removal, suspension, demotion or furlough. The fact that there is a technical violation does not change the fact that the claim must be analyzed in the context of a discrimination

claim.

Petitioner argues that the choice of the appointing authority to use the employment list instead of the promotion list demonstrates intent to discriminate against Petitioner. The fact that Petitioner was within the rule of three on the promotion list when she interviewed for the Allentown position on December 13, 2001 proves that she would have been within the rule of three if the promotion list was used to fill the Allentown position in February 2003.

In dicta, Pronko, supra. at 18 states, "...the Act's purpose, promoting the making of unbiased personnel decisions based upon job-related criteria, would not be furthered were we to permit a mistake which causes a deserving employee to be passed over for promotion to go unrectified."

Here there is not only a technical violation of the Act, but Petitioner has demonstrated an intent to discriminate on the part of the Appointing Authority in addition to presenting a prima facie case of discrimination under the McDonnell Douglas/Burdine analysis yet Petitioner was not even afforded a hearing. The evidence upon which Respondent's Motion to Dismiss is based has been found to be defective by Respondent itself. Petitioner should at least be afforded the opportunity to cross-examine not only the person who requested the list, but the person who prepared the list and the candidates on the list.

II(c). WHETHER THE RESPONDENT'S FINDING IN ZANOTTO V. SCSC, (Appeal No. 24004) OF A TECHNICAL ERROR IN THE ELIGIBLE LIST IS EQUIVALENT TO DISCRIMINATION PER SE AND ENTITLES PETITIONER TO THE NEXT AVAILABLE POSITION.

The integrity of the Respondent's evidence supporting its Motion to Dismiss has been called into question by the Civil Service Commission's own ruling in the case of Sharon Zanotto v. SCSC (Appeal No. 24004). The SCSC confirmed that the list employed to hire the Indispensable Party, Beverly Doneker, contained ineligibles. There is no evidence by the Respondent in the case in chief to show that the list was properly purged. Petitioner was merely provided a redacted copy of the employment list attached to Respondent's Motion to Dismiss. Evidence produced at the hearing on Zanotto v. SCSC demonstrated that 133 people were on the eligible list as of August 30, 2004. As of September 16, 2004 the list only included 88 eligibles. Those eliminated from the list were ineligibles and those eliminated due to a purging of the list. Purging eliminated those that did not take the test but were carried over from the previous test. A current Workers' Compensation Judge explained to Petitioner that candidates with high scores knew not to re-take the test because the list was never purged in compliance with the Act and this way candidates did not risk getting a lower score on a harder subsequent test. No evidence was produced by Respondent

that the employment list from which Beverly Doneker was hired had been properly purged prior to her hire so that it did not contain ineligibles or eligibles from the prior list that did not re-take the test in 2001.

III. WHETHER PETITIONER'S APPEAL TO THE COMMONWEALTH COURT OF PENNSYLVANIA WAS FRIVOLOUS AND WARRANTED AN AWARD OF ATTORNEY'S FEES AND COSTS FOR THE INDISPENSABLE PARTY.

Petitioner's appeal to the Commonwealth Court of Pennsylvania was not frivolous. In Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2d 648, 656 (1978) the court explained that, "...the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case...". The Court goes on to explain:

> "...it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success..."

Christiansburg, supra. at 700.

Coates v. Bechtel, 811 F.2d 1045 (7th Cir. 1987) which relied on Christiansburg, supra. for authority, held the merits of the underlying litigation were critical to a determination as to whether costs and counsel fees awarded were unwarranted. In Coates, supra. summary judgment was granted to the defendant and fees and costs awarded to the Defendant. On appeal the 7th Circuit found the district court abused its discretion in making the award after it reviewed the factual background of the litigation. Coates, supra. was a civil rights action filed under 42 U.S.C. sec. 1988 alleging discrimination. The Court explained:

> "If prevailing defendants were routinely awarded attorney's fees under Section 1988, civil rights plaintiffs would be extremely reluctant to initiate litigation for fear of being charged with a fee award vastly exceeding the expected recovery, and in some case their ability to pay, thereby vitiating the underlying purpose of Section 1988. See Vandenplas, 797 F.2d at 429, 432; Hershinow, 772 F.2d at 395 (emphasizing the chilling effect large awards would have on plaintiffs); S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinting in 1976 U.S. Code Cong. & Admin. News 5908, 5912 (civil rights plaintiffs should not be deterred 'from bringing good faith actions

to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose')." Coates, supra. at 1049.

The court in Coates, supra. at 1051 concluded that when determining whether or not a claim is frivolous the court must determine what information was available to the plaintiff at the time the lawsuit was initiated; not whether the claim is ultimately proved to be without merit.

Petitioner's case is analogous to Coates, supra. in that she is asserting her constitutional rights and was precluded from obtaining evidence to prove her case. The State Civil Service Commission and the Department of Labor and Industry are in control of the evidence. If it was other than what is asserted by Petitioner, the Commonwealth would have readily produced, and flatly proven the Petitioner wrong. As they are unable to do this, they instead make it uncomfortable to pursue the litigation further by making it financially infeasible for Petitioner to pursue her rights, which is itself a violation of her rights.

IV WHETHER RESPONDENT VIOLATED PETITIONER'S CONSTITUIONAL DUE PROCESS RIGHTS.

Respondent did not conduct proceedings in compliance with Constitutional Due Process. U.S. Const. amend. XIV, sec. 1. The rules of evidence are relaxed in administrative proceedings.[10] Petitioner was told she could obtain her subpoenas at the pre-hearing conference scheduled for May 1, 2003. After she filed her pre-hearing memorandum on April 25, 2003, the Pre-Hearing Conference was cancelled. Petitioner was denied the right to obtain subpoenas because she was told the hearing scheduled for May 7, 2003 was continued because the Motion to Dismiss could resolve the issue. Petitioner was precluded from obtaining discovery that is in the hands of Respondent held by both the appointing authority and the SCSC. The redacted list submitted as evidence to support the Appointing Authority's Motion to Dismiss is a hearsay document. Petitioner was not afforded the opportunity to cross-examine the person who certified the list to see if the list had been properly purged, and when that had been accomplished as required by 71 P.S. Section 741.507. Further, Petitioner was unable to question the candidates on the list, including the Indispensable Party, to see if they had actually taken the test in 2001 and were qualified to take the test on the date it was administered. Petitioner was precluded from cross-

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[10] 2 Pa.C.S.A. Sections 505 and 554.

examining the appointing authority representative, Matt Stine, (See Appointing Authority's Motion to Dismiss at page 2, paragraph 2) who requested the civil service lists for purposes of filling the vacant position. No affidavit of Matt Stine was submitted with the Motion to Dismiss to support this allegation. The SCSC ignored Petitioner's assertion that for each job vacancy more than one list is certified. The promotion lists certified for the position were not produced as evidence nor was Petitioner permitted to cross-examine the person who requests the lists for the position.

The record certified by the SCSC to the Commonwealth Court failed to include Appellant's Preservation of Objections to Procedures Before the Civil Service Commission, any of the Pre-Hearing Conference Memorandums that indicated the evidence to be presented by each of the parties at the hearing originally scheduled for May 7, 2003. The SCSC never ruled on objections filed as to the procedures before the SCSC. Nor did it rule on objections to Appointing Authority's Pre-Hearing Conference memorandum. Petitioner filed a Supplemental Reproduced Record with the Commonwealth Court to complete the record to be reviewed. The Commonwealth Court in its decision filed April 1, 2004 ruled in footnote 7 (Appendix C at A-7) that Petitioner waived any issues concerning the Commission's abuse of its power due to the fact that it was not listed as an issue in her statement of questions. Even though the Commonwealth Court refused to consider the issue, Petitioner properly preserved the issue to

be reviewed by the Court by filing with the Commonwealth Court the Supplemental Reproduced Record, outlining in the Statement of the Case under the procedural history the complained of actions of the Commission and under the Argument stated the issue quite plainly as "Whether actions by the Civil Service Commission constitute an abuse of power in adjudicating the Complaint of Petitioner." and "Whether Respondent violated Petitioner's constitutional rights by failing to provide Petitioner ten (10)days to respond to Respondent's Motion to Dismiss." In Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania she listed the issue in her Questions Presented for Review as "Whether Appellant waived her constitutional objections to the procedures of the Civil Service Commission." The Supreme Court denied Petitioner's Petition for Allowance of Appeal.

The Pennsylvania Rule of Professional Conduct 3.3 requires candor toward a tribunal. It specifically forbids an attorney to "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;" Pa. R. Prof. Con. 3.3(a)(2). The Respondent is both adjudicator and opponent.1

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[1] "There has been, however, a tendency in the decisional law in which the issue is one of a fair tribunal to give precedential value to prior decisional law in which the sole issue or controlling issue concerned the commingling of functions of staff personnel of an administrative agency, an

Respondent is also the state and is automatically granted a presumption and deference with regard to official acts. This presumption should not be abused especially in instances where the Respondent is both adjudicator and opponent. As most Petitioners are pro se before the SCSC any motion that could end the litigation such as a Motion to Dismiss should have been served on Petitioner by the Commission with a Notice stating when the response was constitutionally due and outlining Petitioner's rights to discovery to refute the Motion. Instead, Petitioner was called at her home and told to get in a response ASAP. On the same date Respondent

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issue which basically relates to a fair trial rather than a fair tribunal. Of course, it cannot be gainsaid that the end product of the want of a fair tribunal is an unfair trial nor that the want of a fair trial regardless of the impartiality of the tribunal must be condemned; but in our search for even justice before administrative adjudicatory agencies, these two concepts must be delineated in defining the elements of a fair trial and the criteria of a fair tribunal.

Turning first to the role played here by the Board it must be noted that a not insignificant number of our State administrative agencies, The Dental Board included, are authorized under their operative statutes to investigate possible violations of the law, to act as complainant in enforcement proceedings and to adjudicate enforcement proceedings, including those initiated by the agency as complainant." Bruteyn v. State Dental Council & Exam Bd., 32 Pa.Cmwlth. 541, 380 A.2d 497 (1977).

issued a pre-hearing conference notice and requirements for filing a memorandum outlining the evidence Petitioner planned to present. She was told she could obtain subpoenas for the May 7th hearing at the pre-hearing conference scheduled for May 1st.

Petitioner in paragraph two of her response to Respondent's Motion to Dismiss, stated that she was not afforded the opportunity to cross-examine the averments made in paragraph two of the Motion to Dismiss. Pennsylvania Rule of Evidence 201(e) provides that a party is "entitled" upon timely request to an opportunity to be heard as to the propriety of taking judicial notice. Petitioner was never afforded the opportunity to cross-examine Matt Stine to ascertain what he requested and what he actually received from the Civil Service Commission. Respondent failed to attach any sworn affidavit from Mr. Stine supporting the allegations made in Paragraph two. Petitioner asserts that Matt Stine not only received an employment list but two promotion lists as well and that Petitioner was within the Rule of Three on both promotion lists thus providing the appointing authority the opportunity to make a decision and discriminate against the Petitioner on the basis of gender. Petitioner's response to the Defendant's Motion to Dismiss has properly preserved the issue for review by this Court.

REASONS FOR GRANTING THE PETITION

The greatest good that can be achieved by granting a writ of certiorari in this case is to keep government honest in its dealings with the public and its own employees. There is no room for secrecy when advocating fairness. Legitimate policies and standards do not need a "cloak". There is no important government objective in utilizing a promotion list and promoting male Attorney Examiners with only a grade of 75 but requiring female Attorney Examiners to compete with those on the employment list and have a competitive grade of 90 or above to be considered for promotion.

This case is important because it involves state action. The State if the form of not only the Workers' Compensation Office of Adjudication, but the Department of Labor and Industry, the Civil Service Commission, the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, are all charged with the duty to uphold the Constitution. If they are permitted within their own systems to encourage and support gender discrimination, at any level, how can they fairly administer and rule on constitutional questions concerning the public. I believe this Court needs to examine the methods employed in this case with the pro se Petitioner in mind. Most individuals appearing before the Civil Service Commission are pro se. Many in Workers' Compensation cases are pro se and almost all in Unemployment Compensation cases are necessarily pro se. The protections of due process and equal protection are for all citizens. Civil Service advancement is supposed to be based on merit, not on whether or not you are a "player". If the appointing authority, the Department of Labor and Industry, is willing to sanction gender discrimination in its own promotion practices how can it police it properly in Workers' Compensation and Unemployment Compensation or any other administrative agency under its jurisdiction.

The second good this Court could achieve by granting certiorari in this case is to use it to provide a uniform rule to prove gender discrimination by adopting the alternate fourth prong to the McDonnell Douglas/Burdine test set out in Mitchell v. Toledo

Hospital, supra. Currently the Third, Eighth and Tenth Circuits do not cite to the case. Section 105.12(c) of the Civil Service Regulations requires the initial appeal alleging discrimination to set out the elements outlined in Mitchell, supra. to obtain a hearing. Adopting the criteria would preclude a situation such as the one Petitioner now stands in where promotion and not initial hiring is the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

In the alternative Petitioner requests this Court to summarily dispose of the matters presented on the merits, in accordance with Supreme Court Rule 16.1, and:

(1) order the State Civil Service Commission to appoint Petitioner to the next available position based upon the technical error confirmed by the Commission in Zanotto v. SCSC; or

(2) order the State Civil Service Commission to provide Petitioner with the opportunity to be heard on the issue of gender discrimination in her non-promotion.

Respectfully submitted,

Mary Catherine Baur

Mary Catherine Baur, Petitioner, Pro Se

Date: April 23, 2005